

United States v. Mendoza-Lopez, No. 02-50583

DEC 08 2003

B. FLETCHER, Circuit Judge, concurring.

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

I concur in the majority's disposition but not in the first section of its analysis.

In his plea agreement with the government, Mendoza-Lopez agreed that the sentencing enhancement provision in U.S.S.G. § 2A2.2(b)(2)(B) could be applied with respect to his assault crime. Although Federal Rule of Criminal Procedure 11(c)(1)(C) provides that stipulations regarding sentencing provisions are binding once a plea agreement is accepted by the district court, the plea agreement in this case did not refer to the sentencing enhancement provision in U.S.S.G. § 2L1.1(b)(4)(B) and therefore did not require the district court to impose that enhancement. *See United States v. Franco-Lopez*, 312 F.3d 984, 989 (9th Cir. 2002) ("The courts enforce the literal terms of the plea agreement, but construe ambiguities in favor of the defendant, ordinarily placing on the government responsibility for any lack of clarity.") (internal quotation marks and citations omitted).

The majority interprets Mendoza-Lopez's stipulation to the § 2A2.2(b)(2)(B) enhancement as a factual admission of intent to injure, but reliance

on such an implied factual stipulation is inappropriate for several reasons. First, factual stipulations in a plea agreement are not binding on the district court, which has an independent obligation to determine the facts relevant to sentencing. *See* U.S.S.G. § 6B1.4(d) (Policy Statement) (“The court is not bound by the [factual] stipulation [in a plea agreement], but may with the aid of the presentence report, determine the facts relevant to sentencing.”); U.S.S.G. § 6B1.4, Commentary (“Even though stipulations are expected to be accurate and complete, the court cannot rely exclusively upon stipulations in ascertaining the factors relevant to the determination of sentence.”). Second, factual stipulations intended to support a sentencing determination should “set forth with meaningful specificity the reasons why the sentencing range resulting from the proposed agreement is appropriate.” U.S.S.G. § 6B1.4(a)(3). Mendoza-Lopez’s plea agreement included no meaningfully specific stipulation regarding intent. Third, the majority’s interpretation is not supported by the factual recitations actually included in the plea agreement. Both at his change of plea hearing and in the plea agreement, Mendoza-Lopez admitted only that he accelerated his car “to evade and flee the [I-15 immigration] checkpoint,” not that he accelerated in order to injure Officer Shine.

Finally, by the time of his sentencing hearing, Mendoza-Lopez had made it

clear in his sentencing memorandum that he did not act with the requisite intent to injure. *See United States v. Dayea*, 32 F.3d 1377, 1380 (9th Cir. 1994) (interpreting dangerous weapon enhancement in U.S.S.G. § 2A2.2(b)(2)(B) as requiring intent to injure). Mendoza-Lopez’s lawyer repeated this argument at sentencing, and Mendoza-Lopez himself told the district court that “[i]t was not [his] intention to harm anyone.” Once the parties’ factual disagreement regarding intent was clear, Federal Rule of Criminal Procedure 32(i)(3)(B) required the district court to make a specific finding resolving the dispute. *See United States v. Carter*, 219 F.3d 863, 867 (9th Cir. 2000) (“For each disputed fact upon which the district court intends to rely in imposing the sentence, the district court must make an explicit factual finding that resolves the dispute.”) (vacating sentence and remanding for resentencing because district court imposed enhancement without explicitly resolving disputed factual issues). In this case the district court acknowledged the parties’ dispute but, as Mendoza-Lopez points out in his brief, failed to resolve the dispute on the record.

For these reasons I do not concur in the majority’s analysis with respect the six-level enhancement imposed under U.S.S.G. § 2L1.1(b)(4)(B). Nonetheless, I concur in the majority’s disposition because the other sentencing provisions applicable in this case and the district court judge’s statements at sentencing make

it clear to me that the district court could and would impose the same sentence if this case were remanded.